No. 12,457

IN THE

United States Court of Appeals

For the Ninth Circuit

KURT ADOLPH TAUCHEN,
Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

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JURISDICTION.

Appellant filed his appeal on January 6, 1950, from an Order denying his petition for naturalization entered in the District Court of the United States for the Northern District of California dated October 14, 1949, and a further Order denying appellant's Motion to Alter Said Judgment dated December 8, 1949, upon his failure to establish to the satisfaction of the District Court that he had shown himself to be attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, as required by

Section 307(a) of the Nationality Act of 1940 (8 U.S.C.A. 707(a)) under which Section he filed his petition. (See appendix.)

His appeal designates Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, as the appellee. The appeal is ineffective because the appellee designated is not, and cannot be made to be, the proper party litigant in this proceeding since he is not empowered by Congress to grant the relief sought in plaintiff's bill of complaint.

The administration of the immigration and naturalization laws is placed generally under the authority of the Attorney General of the United States. *Congress has entrusted to the Courts alone the power to grant or deny citizenship.* 8 U.S.C.A. 701. (See appendix.) The District Director of the United States Immigration and Naturalization Service is powerless to grant the relief sought by the appellant.

The United States of America is the only proper party to be named as appellee.

In the case of *Bonham, District Director of Immigration v. Chi Yan Cham Louie,* 166 F. (2d) 15, and in *Carmichael v. Wong Choon Hoi,* 164 F. (2d) 696, the Ninth Circuit Court dismissed appeals where the local District Director sought to bring the action in his own name. The Court held he was not a proper party to the litigation. Furthermore, a motion to substitute the United States of America as appellant in the *Chi Yan Cham Louie* case, supported by the

appellee's stipulation that the United States be so substituted, was denied on the ground that such stipulation could not confer jurisdiction.

It seems clear, therefore, that in this case, as in those above cited, the appeal should be dismissed for lack of the proper party defendant.

STATEMENT OF THE CASE.

The appellant was born in Berlin, Germany, on December 4, 1906 and thereafter lived in Vienna, Austria, until he became twenty-two years of age, when he went to live in England where he became a naturalized British subject. He entered the United States on August 26, 1938, and has maintained his residence here since then. He has never been married. (T. 2, 17.) On May 7, 1940, he declared his intention to become a citizen of the United States in the United States District Court at Chicago, Illinois. (T. 3.)

He filed his petition for naturalization No. 85719 in the United States District Court at San Francisco, California, on May 6, 1947 (T. 2), under the general provisions of the Nationality Act of 1940. (See Appendix.)

On December 9, 1941, the appellant was apprehended and interned as an alien enemy, and was released on parole on December 7, 1943. His parole was terminated on November 15, 1945. (T. 17 and 18.) During the period of his internment he was ques-

tioned by government officers concerning his willingness to bear arms in behalf of the United States. In answer to such questions he then stated that he would not bear arms against Germany, and likewise would not bear arms against Great Britain, and that his objections to such service were not based upon religious grounds. (T. 18.)

At the hearing of his petition for naturalization before the District Court on October 14, 1949, in answer to the question as to his reason for being unwilling to bear arms against either Germany or Great Britain, he testified that before his internment he had always answered that he would bear arms against Germany, but that after he had been interned he then thought that if he continued to answer in the affirmative he would be guilty of treason. He gave the same reason for unwillingness to bear arms against Great Britain. (T. 18 and 19.)

At the Court hearing, in response to the question of his counsel as to whether his refusal to bear arms against either Germany or Great Britain was based upon his apprehension that such a declaration would be not only dishonorable but also possibly a violation of law by which he was bound under antecedent obligations, his answer was "Yes." (T. 20.)

At the hearing the petitioner testified that while interned he had voluntarily assisted in the work of clearing land for artillery ranges for the Army, and had incurred the hostility of other internees by so doing. (T. 21.)

At the conclusion of the Court hearing the Immigration and Naturalization Service, through its duly appointed and authorized Designated Naturalization Examiner, Frances P. Boland, opposed the grant of the petition for naturalization and moved its denial on the ground that the petitioner, by his declaration of unwillingness to bear arms for the United States either against Germany or Great Britain, had indicated his lack of attachment to the principles of the Constitution of the United States, and had failed to show that he was well disposed to the good order and happiness of the United States, as required by Section 307 of the Nationality Act of 1940, under which his petition for naturalization was filed. (T. 22.)

Upon termination of the Court hearing the matter was taken under submission, and an order was thereafter entered by the Court denying the petition on the ground that the petitioner had failed to establish that he had been attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (T. 9, 12, 22.)

CONTENTIONS OF APPELLANT.

On February 2, 1950, the appellant filed his Concise Statement of Points on which he intended to rely, as follows:

1. The District Court erred in holding that petitioner evidenced lack of attachment to the

principles of the Constitution by stating that he was unwilling to bear arms against countries to which he owed the allegiance of a citizen, until admitted to United States Citizenship.

2. The District Court erred in finding that petitioner's statements were unqualified by such explanation, when made. (T. 32, 33.)

The appellant contends that the District Court lacked the power to hold that his unwillingness to bear arms was a bar to his naturalization, and in support thereof he cites the case of *U. S. v. Siem,* 299 Fed. 582, and the case of *Tutun v. U. S.,* 12 Fed. (2d) 763. (Appellant's brief, pages 10 and 11.)

ARGUMENT.

It is well known that following both the First and Second World Wars a considerable number of aliens who had claimed exemption from military service for the United States upon the ground of alienage, or who had by other means indicated their unwillingness to so serve the United States, thereafter petitioned for naturalization. In the great majority of such cases their petitions have been denied by the Courts on the ground that such acts precluded them from establishing their complete attachment to the principles of the Constitution of the United States and their proper disposition to the good order and happiness of the United States as required by the naturalization laws.

This rule has been applied in the cases of neutral and enemy aliens alike. Since the end of World War II the naturalization Courts have denied many such cases for the same reason.

The *Siem* case cited by the appellant (Appellant's brief, p. 10) is not an authority on the issue of whether such an alien should or should not be granted citizenship, since it was a proceeding brought in the Appellate Court seeking to cancel a Certificate of Naturalization issued out of the District Court, and was based upon the sole contention that the naturalization of such an alien was *illegal.* The suit was brought under Section 15, Act of June 29, 1906, as amended by the Act of May 9, 1918. (See Appendix.) This Section provided only for a direct attack upon the naturalization certificate where it had been procured by either fraud or illegality. Upon this narrow ground the Appellate Court ruled that the action of the trial Court in admitting the petitioner did not go beyond its legal authority, and therefore the naturalization certificate had not been procured by illegality. A quotation from the Court's decision makes this clear:

> "In other words, we are not convinced that the mere fact that the applicant has claimed exemption from military service is sufficient in itself, *as a matter of law,* to require cancellation of his certificate of citizenship, regularly granted upon a hearing as to his qualifications under the Naturalization Law." (Italics supplied.)

The appellant might have cited additional cases in which citizenship has been granted despite the claim

of exemption from military service on the ground of alienage; among these being; *Petition of Kohl,* C.C. A. 2d 1945, 146 F. (2d) 347; *Petition of Ajlowny,* D.C. Mich., 1948, 77 F. Supp 327. Cases in which the Courts have held that the naturalization of such aliens may be postponed until at least five years from the time when they expressed unwillingness to bear arms in support of the United States are: *In re Bevelacqua,* 295 F. 862 (D.C. Mass. 1924); *In re Shanin,* 278 F. 739 (D.C. Mass.); *Petition of Escher,* 279 F. 792 (D. C. Tex. 1922); *Hauge v. U.S.,* 276 F. 111 (C.C.A. 9, 1921); *In re Rubin,* 272 F. 697 (D.C. Mich. 1921); *In re Silberschutz,* 269 F. 398 (D.C. Mo. 1920); *In re Tomarchio,* 269 F. 400 (D.C. Mo. 1920); *In re Aldecoa,* D.C. Idaho, 1938, 22 F. Supp. 659; *Labeko v. Carr,* C.C.A. Cal. 1940, 111 F. (2d) 732. A similar case, Petition No. 85732, of Kurt Bendit, a native of Germany, was recently denied for the same reason by Judge Goodman in the U.S. District Court at San Francisco.

An exhaustive review of all the cases of this kind, both reported and unreported, would result in the certain conclusion that the Courts have been deciding the issue in each case upon its own particular merit, since it is evident that an alien's declaration of willingness or unwillingness to bear arms for the United States during a time of national peril—as such act reflects upon his degree of loyalty—must be viewed in the light of all the surrounding circumstances.

Applying the facts of the present case to the appellant's first specification of error (Appellant's

brief, p. 7) he contends, therefore: that the District Court erred in refusing to hold, *as a matter of law,* that this petitioner's declaration of unwillingness to support the United States by force of arms against countries of his former or present allegiance necessarily rebutted any inference of his lack of attachment to the principles of the Constitution of the United States or of his proper disposition toward the good order and happiness of the United States. It is submitted that the great weight of judicial authority does not support his contention, and that the District Court was well within the area of its proper and legal discretion in holding that such a refusal did adversely affect the petitioner's claim to such attachment and such good disposition.

Appellant's second specification of error contends that the District Court also erred in its finding that the petitioner, at the time he declared his refusal to bear arms against both Germany and Great Britain, did not then assign as his reason for such refusal his subsisting citizenship obligations to those countries. (Appellant's brief, p. 2.) In support of this view the appellant sets out that the trial Court erroneously supposed that the appellant unqualifiedly and without any explanation, refused to bear arms against Germany and Great Britain, and he asserts that the record shows the error of that supposition. (Appellant's brief, pages 8 and 9.) He recites the language of the trial Court in its order of December 8, 1949 denying his Motion to Alter the previous order of denial of the petition (T. 28) (Appellant's brief,

p. 14), and a portion of the report and recommendation of the Designated Naturalization Examiner of October 14, 1949, which set out that the petitioner "put his refusal on the grounds that, despite his objections, he had been classified as a German and a potentially dangerous alien enemy. He would not bear arms against Great Britain because it might be treason." (T. 15.) The appellant thinks the word "put" in the Designated Examiner's report refers to the time when appellant made his declaration of unwillingness to perform unqualified military service for the United States, and was coincidental, and in connection with, such declaration.

However, the petitioner had just previously been interrogated by the Designated Examiner with particular regard as to why he had refused to serve against Germany and Great Britain, and it is evident that his report was by way of information to the Court that the petitioner had explained to the Designated Examiner his reason for having made his claim while interned, rather than to any statement that the petitioner had declared his reasons for the claim had been stated *at the time* he had made his previous assertion of unwillingness to serve.

The record of the petitioner's testimony before the trial Court is the best evidence of whether he had given a reason for his refusal at the time of his refusal. At the hearing in Court he testified as follows:

> "Q. What was your reason for not being willing to serve against Germany?

A. I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officially classified a German, I was interned for two years as a German National. Then I *thought* if I answered the question in the affirmative I would be guilty of treason.

Q. And what was your reason for not being willing to bear arms against Great Britain?

A. That was also the reason in the case of Great Britain." (T. 18, 19.) (Italics supplied.)

In addition, the record discloses the following testimony of the petitioner:

"Q. And then do we understand your refusal to bear arms against Great Britain and Germany at the time you stated you refused to bear arms against them was based upon *apprehension* that such declaration would not only be dishonorable, but possibly a violation of law by which you were bound by under antecedent citizenship obligations?

A. Yes." (T. 20.) (Italics supplied.)

It is submitted that nowhere in the record is there evidence to support the contention of the appellant that at the time he made his declaration of refusal he also declared his reasons for doing so.

The District Court in its Order denying the Motion to Alter the Judgment emphasized the testimony of the petitioner with regard to his presently assigned reason for having made his previous declaration of

unwillingness to serve unqualifiedly, and concluded that he was then testifying as to his *state of mind* at the time of his declaration of unwillingness to serve. If the petitioner had meant to testify that, *at the time of his refusal to serve,* he had then assigned a reason for such refusal he could easily have said so, and upon his failure to so testify his counsel could as easily have brought it out.

In the absence of anything in the record to substantiate his present claim that he meant to convey something other than what he testified to—which latter was nothing more than a state of mind as to his "apprehension" and what he "thought"—it is difficult to see how the trial Court could have arrived at any other conclusion than that at the time of his refusal he had not declared his reasons for doing so, and that, as stated by the Court:

> "The interpretation he now gives should have been given then if what he then said did not express his attitude." (T. 27.)

The Courts exercising naturalization jurisdiction are keenly aware that an alien's loyalty is without question the most important consideration in determining whether he should be awarded the high privilege of United States citizenship. A long history of judicial precedents has established the dual principle that the burden of proving his complete worthiness rests upon the alien, and that when any doubt remains in the mind of the Court regarding the petitioner's qualifications such doubt should be resolved

in favor of the government. Citizenship denied can be re-applied for; but once granted cannot be easily revoked:

U. S. v. Schwimmer, Ill. 1929, 279 U.S. 644, 73 L.Ed. 889, reversing C.C.A. 1928, 27 F. (2d) 742;

Allan v. U. S., C.C.A. Cal. 1940, 115 F. (2d) 804;

Estrin v. U.S., C.C.A. N.Y., 1935, 80 F. (2d) 105;

In re Bogunovich, Cal. 1941, 114 P. (2d) 581, prior opinion 106 P. (2d) 247;

Beale v. U. S., C.C.A. Minn. 1934, 71 F. (2d) 737, affirming D.C. 1933, 2 F. Supp. 899;

Petition of Zele, C.C.A., N.Y. 1942, 127 F. (2d) 578;

Petition of Wong Sic Lim, D.C. Cal. 1947, 71 F. Supp. 84;

In re Paoli, D.C. Cal. 1943, 49 F. Supp. 128.

CONCLUSION.

The appellant declares his intention not to challenge the established rules that the burden of proving attachment to the principles of the Constitution is upon one who petitions for naturalization, and that the finding of a trial Court with respect to lack of attachment will seldom be disturbed by an Appellate Court. He asks only that the question of attachment be adjudicated in the light of the true facts and not

upon the basis of an erroneous supposition. (Appellant's brief, p. 16.)

The appellee is in entire accord therewith, and asks that the question of attachment shall be adjudicated in the light of the evidence of record. On such record the appellee firmly believes that the order of the District Court of October 14, 1949, denying the petition for naturalization should be affirmed.

Dated, San Francisco, California,
May 1, 1950.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Section 307(a) of the Nationality Act of 1940 (8 U.S.C.A. 707(a)), provides as follows:

No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. (54 Stat. 1142; 8 U.S.C. 707.)

Section 15, of the Naturalization Act of June 29, 1906, as amended by Act of May 9, 1918 (34 Stat. 601 and 40 Stat. 544; 8 U.S.C. 405), (repealed effective January 13, 1941, by Section 504 Nationality Act of 1940 (54 Stat. 1173), 8 U.S.C. 904), provided as follows:

Section 15. That it shall be the duty of the United States district attorneys for the respective districts or the Commissioner or Deputy Commissioner of Immigration and Naturalization upon affidavit showing

good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * *".

8 U.S.C.A. 701. Jurisdiction to naturalize:

"(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing, or which may hereafter be established by Congress in any State, District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, and the District Court of the Virgin Islands of the United States; * * *".